No. 88-152

In The
Supreme Court of the United States

—o—

IN RE: All American Services, Ltd.,
Petitioner

—o—

ON WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

REPLY TO BRIEF IN OPPOSITION

—o—

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September 17, 1988

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TABLE OF AUTHORITIES

REPLY TO BRIEF OF RESPONDENTS

Pursuant to Rule 22.5, petitioner, All American Services, Ltd., files this reply to respondents' brief in opposition.

First. Respondents' brief in opposition materially mistates the law. Petitioner has not applied to this Court for the exercise of its certiorari jurisdiction pursuant to Rule 20, as respondents say in their brief (p. 2). Rather this is an application for mandamus or common law certiorari under this Court's Rule 27 and pursuant to the All Writs Statute, 28 U.S.C. § 1651. It is well settled that mandamus or "common law certiorari," as Professor Moore calls it, 9 MOORE'S FEDERAL PRACTICE, ¶ 110.26, p. 278 (1987), lies to "compel [an inferior court] to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 26 (1943); *Will v. United States,* 389 U.S. 90, 95 (1967).

In reference to the common law writ of certiorari, this Court has stated that § 1651

> "affords ample authority for using the writ as an auxillary process and, whenever there is imperative necessity therefor, as a means of . . . giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways."

United States v. Beatty, 232 U.S. 463, 467 (1914).

Our position is that the Fifth Circuit's dismissal of petitioner's appeal was a plain abuse of discretion and a denial of its "existing appellate authority" resulting in the deprivation of petitioner's property—some three million dollars—without due process of law. Surely where the

costs of transcript preparation have been paid, where the transcript has been lodged with the Court of Appeals, where the reporter's fee has been satisfied, and where petitioner tendered payment therefor, it is an abuse of discretion for the appellate court to dismiss a timely noticed appeal. "Machine-like rigidity cannot be the final goal of judicial administration." 9 MOORE'S FEDERAL PRACTICE, ¶ 110.26 p. 276 (1987). Furthermore, the label applied to our request for extraordinary writs—either "mandamus" or common law "certiorari"—is unimportant. 9 MOORE'S FEDERAL PRACTICE, ¶ 110.26 p. 282 (1987), citing *Ex parte Simmons,* 247 U.S. 231 (1918).

A. Respondents say in their brief (p. 15) that no authority exists permitting issuance of mandamus to compel an appellate court to entertain an appeal improperly dismissed below. To the contrary, both Chief Justice White and Chief Justice Hughes exercised precisely such authority for a unanimous Court in *Ex Parte Abdu,* 247 U.S. 27 (1918) and in *In re 620 Church St. Corp.,* 299 U.S. 24 (1936). In the former case, the Court issued a peremptory writ to compel the court of appeals to permit the filing of the appellate record without the prepayment of costs. Chief Justice White spoke of "[l]ooking . . . through form to the essence of things," 247 U.S. at 29, an approach which if applied here certainly suggests that petitioner has been denied its day in the Fifth Circuit.

Later, in *House v. Mayo,* 324 U.S. 42, 44 (1945), this Court said of § 262 of 28 U.S.C., the predecessor of the All Writs Act, 28 U.S.C. § 1651:

> "By virtue of that section we may grant a writ of certiorari [common law certiorari] to review the ac-

> tion of the court of appeals in declining to allow an appeal to it."

B. The time bar urged by respondents in their brief (pp. 2, 13) does not apply to petitioner's application for extraordinary writs. "There are no time limitations specified in statute or rule for filing in the Supreme Court an application for one of the extraordinary writs, such as mandamus, . . . or common-law certiorari." STERN, GRESSMAN & SHAPIRO, SUPREME COURT PRACTICE (6th ed. 1986), p. 304.

As for the required "exceptional circumstances warranting the exercise of the Court's discretionary powers" under this Court's Rule 26, we rely on

> " 'intervening circumstances of substantial . . . effect,' justifying application of the established doctrine that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.' "

Gondeck v. Pan American Airways, 382 U.S. 25, 26-27 (1965). *Accord, United States v. Ohio Power Co.,* 353 U.S. 98 (1957); *United States v. Maryland for the Use of Meyer,* 382 U.S. 158 (1965).

Pinter v. Dahl, 56 U.S.L.W. 4579 (U.S. June 15, 1988), was decided by this Court and the Fifth Circuit invited the other appellants to submit "letter briefs . . . on the applicability, if any, to this case of *Pinter v. Dahl.*" This "intervening circumstances of substantial . . . effect," the change in the substantive law defining a seller of securities within Section 12(1) of the Securities Act, required petitioner's application for extraordinary writs, which was filed July 25, 1988. The respondents' submis-

sion to the Fifth Circuit's invitation admits that the trial judge's jury charge defining "a seller"—a necessary prerequisite to § 12(1) liability—is erroneous. There is every reason to anticipate a reversal by the Fifth Circuit will be mandated by this Court's ruling in *Pinter*.

Second. Two material mistatements of fact taint respondents' brief in opposition.

A. Respondents say in their brief (p. 18) that All American "neither had made arrangements to pay for its share of the transcript so as to cure the default nor had responded to the Fifth Circuit's warnings." This is false and respondents know it.

Petitioner sent $1,206.38 each (see App. A, B and C, *infra*, pp. 1, 2, 3 and 4) to counsel for Fryar, WLJ, Valley Forge, and respondents. Only respondents refused payment (see App. D, *infra*, p. 5).

B. Respondents also say in their brief (p. 20) that All American "still has not even attempted to file its brief." This is plainly false and respondents know it.

Petitioner twice filed an original brief, serving respondents, with the Clerk of the Fifth Circuit (see App. E, *infra*, p. 6), once on December 10, 1987 while petitioner's original motion to reinstate the appeal was pending. Next, on January 11, 1988, petitioner refiled its original brief on the merits with its motion for reconsideration of the Fifth Circuit's dismissal of its appeal. The Fifth Circuit failed to address petitioner's request for suspension of its rules under FRAP 2. The Clerk of the Court of Appeals refused to file petitioner's brief on both occasions and returned it to counsel.

CONCLUSION

We respectfully submit that the interests of justice require this Court to issue a peremptory writ of mandamus to the Fifth Circuit Court of Appeals reversing its dismissal of petitioner's appeal and requiring the Fifth Circuit to consider petitioner's appeal along with those of Fryar, Wright, Lindsey & Jennings, and Valley Forge.

The Fifth Circuit should be ordered to receive petitioner's brief, twice previously attempted to be filed with the Fifth Circuit, and the case should be adjudicated on the record currently lodged in the Fifth Circuit. Petitioner makes no request for oral argument in the Fifth Circuit.

Respectfully submitted,

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Counsel of Record

September 17, 1988

APPENDIX A

December 10, 1987

Mr. Phillip A. Wittmann
Attorney at Law
546 Carondelet Street
New Orleans, Louisiana 70130-3588

RE: EDWARD C. ABELL, JR. AND CAREY WALTON, ET AL V. JOE E. FRYAR, ET AL - No. 87-4260

Dear Mr. Wittmann:

Although I have spoken with you and Ms. Barrasso regarding reimbursement to the plaintiffs by All American of its share of the cost of the transcript on appeal, we have not yet learned the exact amount the plaintiffs paid to the Court Reporter.

Nevertheless, in speaking with counsel for the other parties, it was learned that Joe Fryar and Wright, Lindsey & Jennings have paid a total of $4,825.50 each for their pro rata share. Consequently, we multiplied that number by three, and derived at a total of $14,476.50. When we divide that number by four, the pro rata share of each of the parties would be $3,619.12. The difference between each amount paid by Fryar and Wright, Lindsay & Jennings, and their actual pro rata share is $1,206.38.

Assuming the pro rata share of the cost of the transcript for the plaintiff was the same or similar to that of Fryar and Wright, Lindsay & Jennings, we are hereby tendering payment of $1,206.38 to you, as counsel for the plaintiffs, to reimburse the partial pro rata share of All American, which each party has apparently absorbed.

Please let me know at your earliest convenience whether or not this amount is sufficient, or constitutes an overpayment.

With kindest regards, I remain

Yours very truly,

Leslie R. Leavoy, Jr.

APPENDIX B

December 10, 1987

Mr. J. Minos Simon
Attorney at Law
Post Office Box 52116
Lafayette, Louisiana 70505

RE: EDWARD C. ABELL, JR. AND CAREY WALTON, ET AL V. JOE E. FRYAR, ET AL - NO. 87-4260

Dear Mr. Simon:

As per our telephone conversation apropos the cost of the transcript on appeal in this case, it is my understanding that your client, Joe E. Fryar, has paid $4,825.50 to the Court Reporter for his pro rata share of the cost. Assuming that the plaintiffs and Wright, Lindsey & Jennings have paid the Court Reporter a similar amount, we multiplied that cost times three for a total of $14,476.50. When that number is divided by four, which would presume All American's participation in sharing the cost, each party should have paid $3,619.12.

I am enclosing a check in the amount of $1,206.38, made payable to your client at your direction for reimbursement of part of All American's pro rata share of the cost of the transcript.

Please let me know if this is sufficient, and if not, we will make arrangements to have our client pay any additional amount.

With kindest regards, I remain

Yours very truly,

Leslie R. Leavoy, Jr.

lhm
enclosure

APPENDIX C

December 10, 1987

Mr. D. Mark Bienvenu
Attorney at Law
Post Office Box 3527
Lafayette, Louisiana 70502-3527

RE: EDWARD C. ABELL, JR. AND CAREY WALTON, ET AL V. JOE E. FRYAR, ET AL - NO. 87-4260

Dear Mr. Bienvenu:

As per our telephone conversations regarding the cost of the official transcript on appeal in this case, please find enclosed payment in the amount of $1,206.38. We have tendered payment in the same amounts to the plaintiffs and Joe Fryar.

It was learned in our discussions with counsel for Fryar and you that payments had been made by Fryar and Wright, Lindsey & Jennings in the amount of $4,825.50 each for the official transcript. Assuming that the plaintiffs paid the same or similar amount, we multiplied $4,825.50 times three, for a total of $14,476.50. When we divide that number by four, each party's pro rata share should be $3,619.12. The tendered payment enclosed represents the difference between what your client was required to pay for the official transcript, and what they should have paid.

Please let me know if this payment is sufficient, and with kind regards, I remain

Yours very truly,

Leslie R. Leavoy, Jr.
lhm
enclosure

APPENDIX D

December 11, 1987

Leslie R. Leavoy, Jr., Esq.
Post Office Box 1911
Alexandria, Louisiana 71301

Our file number
54,347

Re: Edward C. Abell, Jr., et al. v. Potomac Insurance Company of Illinois, et al.

Dear Mr. Leavoy:

I enclose herein your check of $1,206.38 transmitted by letter dated December 10, 1987. We return the check because as of the present date, All American Services Company, Ltd.'s appeal has not been reinstated by the Fifth Circuit Court of Appeals. Moreover, as set forth in our Memorandum in Opposition to the Motion to Reinstate, we strongly oppose the reinstatement.

Further, the amount tendered appears to be incorrect according to conversation recently had with the court reporter. Ms. Ezell advises that Stone, Pigman has paid her the amount of $7,111.50 for the transcript prepared in connection with the above referenced matter. Accordingly, the amount tendered is substantially less than the amount of the pro rata share that should have been borne by All American if it had intended to prosecute its appeal.

With kind regards,

Sincerely,

/s/ Judy Y. Barrasso
Judy Y. Barrasso
Of STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON

JYB/cb
Enclosure

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NUMBER 87 4260

EDWARD C. ABELL, JR. and CAREY WALTON, et al,
PLAINTIFFS-APPELLEES,

VERSUS

JOE E. FRYAR,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF LOUISIANA
HONORABLE JOHN M. SHAW, JUDGE PRESIDING

ORIGINAL BRIEF ON BEHALF OF DEFENDANT-
APPELLANT ALL AMERICAN SERVICES
COMPANY, LTD.

CHRIS J. ROY (A LAW CORPORATION)
711 Washington Street
Post Office Box 1911
Alexandria, Louisiana
71301

LESLIE R. LEAVOY, JR.

I. CERTIFICATE OF INTERESTED PERSONS

I, LESLIE R. LEAVOY, JR., counsel of record for Appellant, ALL AMERICAN SERVICES COMPANY, LTD., certify that the following list of persons have or may have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusals pursuant to Local Rule 13(a).

Mr. Michael H. Rubin, 1400 One American Place, Baton Rouge, Louisiana 70825, former attorney for All American Services Company, Ltd.;

Mr. Phillip Wittman, and the 50 members of the Law Firm of Stone, Pigman, Walther, Wittman & Hutchinson, 436 Carondelet Street, New Orleans, Louisiana, attorneys for plaintiff;

Mr. Mark Bienvenu, Post Office Box 3527, Lafayette, Louisiana, Attorney for Valley Forge Insurance Company;

Mr. J. Minos Simon, 4108 West Pinkhood Road, Lafayette, Louisiana 70505, Attorney for Joe E. Fryar;

Mr. Ed Gay, 50th Floor, One Shell Square, New Orleans, Louisiana, Attorney for Wright, Lindsey & Jennings;

Mr. Joe E. Fryar, Alexandria, Louisiana;

Mr. Edward C. Abell, Jr., and the 47 members of the law firm of Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell, Lafayette, Louisiana;

Mr. Carey Walton, Opelousas, Louisiana;

Potomac Insurance Company of Illinois, Chicago, Illinois;

Mr. Rodney Kendrick, Alexandria, Louisiana;
Hancock, Joseph & Daniels, Little Rock, Arkansas;

Mr. Joseph D. Hancock, Little Rock, Arkansas;

Swink & Company, Inc., Little Rock, Arkansas;

Wright, Lindsey & Jennings, Little Rock, Arkansas;

Mr. William E. Skye, Alexandria, Louisiana;

Mr. John W. Peck, Cincinnati, Ohio;

Peck, Shaffer & Williams, Cincinnati, Ohio;

National Union Fire Insurance Company, Pittsburg, Pennsylvania;

All Bondholders of Westside Habilitation Center Bonds, that are members of the Class.

/s/ Leslie R. Leavoy, Jr.
LESLIE R. LEAVOY, JR.

II. STATEMENT REGARDING ORAL ARGUMENT

Because the issues raised on this appeal state substantial and meritorious issues, appellant, All American Services Company, Ltd., by and through undersigned counsel, respectfully requests oral argument be allowed.

CHRIS J. ROY (A LAW CORPORATION)

BY: /s/ Leslie R. Leavoy, Jr.
LESLIE R. LEAVOY, JR.
711 Washington Street
Post Office Box 1911
Alexandria, Louisiana 71301
(Area 318) 487-9537

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CASES

V. STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1291, in that the judgment herein involved represents a final order of the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division.

ADOPTION OF BRIEF FILED BY JOE E. FRYAR

All American Services Company, Ltd. adopts by reference the brief filed by defendant-appellant, Joe E. Fryar, as it pertains to the merits of the plaintiff's claims against the defendants, Fryar and All American. Having reviewed Fryar's submission of the Statement of the Case, including the summary of district court proceedings, the Statement of the Facts, and the claims of the plaintiffs as well as Fryar's arguments directed to the merits of the jury's verdict, All American sees no reason to burden the appellate record of this case with a further recitation of that which is already before this court.

SUMMARY OF THE STATUS OF THE APPEAL OF ALL AMERICAN SERVICES COMPANY, LTD.

A timely notice of appeal was filed on behalf of All American Services Company, Ltd. on April 22, 1987. By order of August 19, 1987, the Clerk of Court for the United States Court of Appeals for the Fifth Circuit dismissed the appeal of All American pursuant to request of counsel for the plaintiffs in that apparently no arrangements had been made by All American to order the transcript of the trial. F.R.A.P. 42, Local Rule 42.3.2.

On December 2, 1987, a motion for reinstatement of appeal was filed by All American.

Paragraph 5 of the motion for reinstatement indicates that arrangements were being made to reimburse counsel for other appellants for All American's pro rata share of the cost of the transcript filed with this court. In furtherance of that endeavor, All American, through undersigned counsel, has tendered payment as reflected by Exhibits 1, 2 and 3 attached hereto.

In that there can be no showing of prejudice to any of the parties to the appeal if the appeal of All American in reinstated, and considering the extreme prejudice that would be suffered by All American should its appeal not be reinstated, it is respectfully submitted that a resolution to this matter requires the participation of all parties concerned.

A NEW TRIAL IS REQUIRED

The lengthy trial of this case came to an end on February 4, 1987, with the jury's verdict in favor of the plaintiffs.

On that morning, the very same morning that the jury began its deliberations, the court assembled all counsel in chambers before those deliberations and informed counsel that two of the jurors, namely Kent Terracina and Rita Teer, were going to be discharged by the court and replaced by the two alternate jurors. Without elaborating any further, the court discharged those two jurors. The case on the merits was then submitted to the jury for their deliberations and verdict.

After this jury reached and rendered its verdict, the court again assembled all trial counsel in chambers and each juror (except for Terracina and Teer) was individually placed under oath and questioned by the court regarding any knowledge he or she may have had of improper outside influence directed to themselves or any other juror. Each juror denied any knowledge of any outside influence on themselves or any other juror. When specifically questioned concerning their individual suspicions of the reason for the discharge of jurors Terracina and Teer, each juror testified that the court's action in discharging the two jurors had no effect on them because they thought it was part of the normal course of events. Upon completion of their individual testimony in chambers, each of the jurors was placed in the custody of federal law enforcement officials who were obviously conducting an investigation of possible jury tampering. As this court is aware, one of the defendants in this case, Joe E. Fryar, has been indicted by a United States Grand Jury for jury tampering.

After the federal law enforcement officials had apparently interviewed the jurors, the court again assembled trial counsel in chambers on the afternoon of February 4,

1987. Each juror, interviewed individually, was reminded that they were still under oath, or in fact, they were actually placed under oath again. This time, when the court questioned each juror, the story changed. This was true of each of the jurors interviewed, with the exception of juror Vidrine. Contrary to their earlier sworn testimony, each juror admitted that he or she had lied to the court during the first interview. They admitted that they had, in fact, been made aware of allegations of outside influence on at least one juror, that being juror Terracina. Each knew that juror Terracina was telling certain other jurors that he had been approached by someone purportedly acting on behalf of Fryar, and that he, Terracina, had been offered $10,000.00 to vote for a verdict that would be favorable to Fryar. It was learned during this interrogation of the individual jurors that juror Terracina had actually written a note disclosing the alleged offer of a bribe and shown it to at least one other juror.

Thus, for the court, and also for assembled counsel, the inquiry sought to discover the reason these jurors had lied to the court and counsel during the initial examination before the jurors were questioned by federal law enforcement officials. To an individual, the jurors, who now protested that they were telling the whole truth, stating that they did not believe juror Terracina's reports of an alleged bribe. More importantly, the jurors feared that disclosure of the bribe offer would result in a mistrial. The jurors' desire to proceed with the deliberations in the case and to reach a verdict was so intense that, as learned during this second voir dire in chambers, they actually, knowingly and voluntarily entered into a secret agreement with one another to conceal what they had heard and seen from the

court and the parties to the case. They must have thought that if they did not divulge what Terracina had said and written, no one would have been the wiser, and the case would have come to a conclusion. They obvoiusly did not know that the court was aware that something was ongoing. The resolve with which each of the jurors, maybe with the exception of Vidrine, held to their positions can somewhat be appreciated considering that each of the jurors, again maybe with the exception of Vidrine, was willing to commit perjury when asked directly by the trial judge whether or not they knew of any possibility of improper outside influence on them. It cannot be argued that the jurors did not realize the significance of these events. The seriousness of an alleged offer to bribe a juror or jurors, whether true or not, cannot be diminished by this suspected lack of credibility of the juror allegedly approached. Each juror knew this; otherwise, they would have "come clean" with the court on the initial interrogation.

In the case of juror Vidrine, here is a juror who was continuing to perpetuate the perjury on which he and all other jurors agreed to commit and suborn, or conversely, a juror, that for some reason, was totally excluded from so obviously an important compact by his fellow jurors.

Perhaps we may never know the true scenario about Vidrine. If further justification was needed for the reversal of the trial court's denial of defendants' motions for new trial, Vidrine's ostracization is apropos.

The possibility of Vidrine's involvement with the improper jury contact is addressed in the indictment of June 3, 1987, of defendant, Fryar.

Paragraph 3 of Count I, paragraph 3 of Count 2 and Count 4 and Count 5 all allege at least attempts at bribing jurors Vidrine and Ronzartz. Neither session of the judge's interrogation of the jurors after the verdict in this case produced even an inkling that there was evidence of improper contact with jurors other than Terracina. Regardless of the legal standards employed by the trial court to rehabilitate the jury in this case, the substantial inferences of prejudice which are apparent from the factual scenario outlined necessitates that this case be remanded for a new trial.

Regardless of plaintiff's allegations that All American Services Company, Ltd. (All American) was established as a "dummy" corporation by Fryar and others to further the alleged securities fraud scheme upon the plaintiffs, All American was entitled to a non-prejudicial consideration of its defense to the plaintiff's claims. That right, embodied in the Seventh Amendment to the United States Constitution is without a doubt overshadowed by the events surrounding the jury's deliberations in this case. Considering that a plausible resolution and reconciliation of what actually occurred with this jury continues to allude all concerned, it was error for the trial court to deny defendant's motions for new trial.

This court and other federal appellate courts have reversed other jury verdicts and remanded those cases for new trials in far less serious cases that presented evidence of outside influence toward an individual juror or an entire jury. See *Leger v. Westinghouse Electric Corporation*, 483 F.2d 428 (5th Cir. 1973) in which on two or three occasions during a lengthy trial, a representative of the

defendant insurer engaged in conversation with a juror regarding multiple subject matters. There was no evidence that the issues of the litigation were discussed. Nevertheless, this court overturned the jury verdict and remanded for a new trial. *Leger v. Westinghouse, supra,* relies on this court's holding in *United States v. Barfield,* 359 F.2d 120 (5th Cir. 1966) and finds that, ". . . harm is inherent in the deliberate contact or communication between juror and litigant." In *Haley v. Blue Ridge Transfer Company,* 802 F.2d 1532 (4th Cir. 1986), a non-juror, who had been mistakenly placed with the jury in that case, and remained throughout the entire first day of the trial, made prejudicial remarks about a defendant in the case to the real jurors. When the error was discovered, the trial judge questioned the non-juror, but allowed the trial to go to verdict. The Fourth Circuit overturned,

> "It is fundamental that every litigant who is entitled to trial by jury is entitled to an impartial jury, free to the furtherest extent practicable from extraneous influences that may subvert the fact finding process. Because an impartial jury is obviously the touchstone of a fair trial, (See *McDonough Power Equipment v. Greenwood,* 464 U.S. 548, 554, 104 S.Ct. 845, 849, 78 L.Ed. 2d 683 (1984)), courts throughout modern history have labored to safeguard sitting juries from improper contacts and advances by third parties." *Haley, supra* at 1535.

The court in *Haley* discusses the rules of *Mattox v. United States,* 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1982), and *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) in which the United States Supreme Court recognizes as "presumptively prejudicial" any private communications to jurors during trial. Rebutting that

presumption is the burden of the party supporting the jury's verdict, in this case, the plaintiffs. In that jurors Terracina and Teer were discharged by the trial court, and the indictment against Fryar raises questions about the credibility of Vidrine and Ronkartz, the presumption that extrinsic contact with the jurors in this case was prejudicial has not been rebutted, even in light of the trial court's two interrogations of the individual remaining jurors.

An attempt was made to rehabilitate this jury. The trial court attempted to rebut the presumption that the deliberating jurors were prejudiced during the second voir dire of the jurors after they had been interviewed by federal law enforcement officials. Each juror denied that the contact, of which they now admit they were aware, had any effect on their verdict. In response to leading questions by the trial court, more than one juror testified that their verdict would have been the same, "down to the penny". Rule 606(b) of the Federal Rules of Evidence prohibits this type of inquiry into a juror's deliberations or decision. The juror may testify regarding the facts surrounding the alleged outside contact, but not about whether that contact, or the knowledge of that contact influenced their decision. Their testimony, in and of itself, pursuant to Rule 606(b) is incompetent. *Haley, supra* at 1535 and *United States v. Harry Barfield Company, supra,* at 123.

Even if the individual juror's testimony as to the affect any alleged improper outside contact may have had upon them was competent, the inquiry by the trial court came too late. In *Krause v. Rhodes,* 570 F.2d 563 (6th Cir. 1967), cert. den. 435 U.S. 923, 98 S.Ct. 1488 (1978), at least one juror had been threatened on three occasions and pos-

sibly assaulted on another. Even though the trial court never interrogated the threatened juror to determine if he were affected by the incidents, and whether the threats had been discussed with other jurors, the Court of Appeal indicated that only an immediate inquiry into the situation may rebut the prejudicial presumption of extrinsic contact with the juror.

In this case, the trial court became aware of allegations of jury tampering as early as January 9, 1987. Then on January 27, 1987, a secret evidentiary hearing was held in chambers regarding the reliability of the information of outside contact with the jury. As stated, it was not until the day of deliberations and submission of the case to the jury, February 4, 1987, that the trial court sought to ascertain what effect, if any, the alleged outside influence had had on the individual jurors. At that late date, it was impossible to determine whether the jury's verdict was influence by what they had seen and heard.

As a matter of fact, the juror's own testimony during the second interrogation by the trial court reveals an actual prejudice that does not even need to be presumed by this court to order a remand for a new trial. When asked why each individual juror had lied to the court during the first interrogation, the consensus of the jurors, evidenced by their secret agreement to withhold what they knew from the court, was the jury's concern that a mistrial would be granted in this case. This jury had invested a great deal of time in this case, and they did not relish the thought that all the time and effort could be for nothing. But this was not the jury's case. Regardless of the jury's verdict, once it was rendered, that should have ended their involve-

ment. Whatever they decided would affect only the plaintiffs and the defendants. It was presumptuous of this jury to adopt the case as their own, but having done so, the presumption of prejudice becomes irrebutable.

All American had no opportunity to protect itself during the trial from any alleged improper influence on the jury. If the jury was prejudiced toward Fryar in that they had been either improperly contacted or learned of improper outside contact, that prejudice was likely transferred by association to the co-defendants, including All American. *Carson v. Polley,* 689 F.2d 562 (5th Cir. 1982); and *United States v. Hanson,* 544 F.2d 778 (5th Cir. 1970). This is especially true considering that at the trial, and as evidenced by the interrogatories presented to the jury for their verdcit, All American and Fryar were inextricably entwined.

There is no evidence available to any of the defendants or to this court as to why juror Teer was excused. Therefore, it cannot be determined whether or not excusing juror Teer was proper. Juror Teer was not questioned by the court or any of the parties; no evidence was presented by any of the other jurors, or any of the parties as to why juror Teer was not allowed to remain on the jury. Accordingly, it cannot be determined whether or not a "tainted" juror was removed properly, or whether a "fair and impartial juror" was excluded without a legally relevant reason. *United States v. Dumas,* 658 F.2d 411 (5th Cir. 1981); and *United States v. Rodriguez,* 573 F.2d 330 (5th Cir. 1978).

CONCLUSION

For the foregoing reasons, and for the reasons addressed in the original brief of defendant-appellant, Fryar, All American is entitled to reversal of the jury verdict and trial court judgment. Alternatively, a remand of this case for a new trial is required.

CHRIS J. ROY (A LAW CORPORATION)

By: /s/ Leslie R. Leavoy, Jr.
LESLIE R. LEAVOY, JR.
711 Washington Street
Post Office Box 1911
Alexandria, Louisiana 71301
(Area 318) 487-9537

CERTIFICATE

I hereby certify that a copy of the above and foregoing Original Brief on behalf of defendant-appellant, All American Services Company, Ltd., has been furnished to all counsel of record herein.

Alexandria, Louisiana this 10th day of December, 1987.

/s/ Leslie R. Leavoy, Jr.
LESLIE R. LEAVOY, JR.

EXHIBIT "A"

December 10, 1987

Mr. J. Minos Simon
Attorney at Law
Post Office Box 52116
Lafayette, Louisiana 70505

RE: EDWARD C. ABELL, JR. AND CAREY WALTON, ET AL V. JOE E. FRYAR, ET AL— NO. 87-4260

Dear Mr. Simon:

As per our telephone conversation apropos the cost of the transcript on appeal in this case, it is my understanding that your client, Joe E. Fryar, has paid $4,825.50 to the Court Reporter for his pro rata share of the cost. Assuming that the plaintiffs and Wright, Lindsey & Jennings have paid the Court Reporter a similar amount, we multiplied that cost times three for a total of $14,476.50. When that number is divided by four, which would presume All American's participation in sharing the cost, each party should have paid $3,619.12.

I am enclosing a check in the amount of $1,206.38, made payable to your client at your direction for reimbursement of part of All American's pro rata share of the cost of the transcript.

Please let me know if this is sufficient, and if not, we will make arrangements to have our client pay any additional amount.

With kindest regards, I remain

Yours very truly,
Leslie R. Leavoy, Jr.
lhm
enclosure

EXHIBIT "B"

December 10, 1987

Mr. Phillip A. Wittman
Attorney at Law
546 Carondelet Street
New Orleans, Louisiana 70130-3588

RE: EDWARD C. ABELL, JR. AND CAREY WALTON, ET AL V. JOE E. FRYAR, ET AL— NO. 87-4260

Dear Mr. Wittmann:

Although I have spoken with you and Ms. Barrasso regarding reimbursement to the plaintiffs by All American of its share of the cost of the transcript on appeal, we have not yet learned the exact amount the plaintiffs paid to the Court Reporter.

Nevertheless, in speaking with counsel for the other parties, it was learned that Joe Fryar and Wright, Lindsey & Jennings have paid a total of $4,825.50 each for their pro rata share. Consequently, we multiplied that number by three and derived at a total of $14,476.50. When we divide that number by four, the pro rata share of each of the parties would be $3,619.12. The difference between each amount paid by Fryar and Wright, Lindsey & Jennings, and their actual pro rata share is $1,206.38.

Assuming the pro rata share of the cost of the transcript for the plaintiff was the same or similar to that of Fryar and Wright, Lindsey & Jennings, we are hereby tendering payment of $1,206.38 to you, as counsel for the plaintiffs, to reimburse the partial pro rata share of All American, which each party has apparently absorbed.

Please let me know at your earliest convenience whether or not this amount is sufficient, or constitutes an overpayment.

With kindest regards, I remain

Yours very truly,
Leslie R. Leavoy, Jr.
lhm
enclosure

EXHIBIT "C"

December 10, 1987

Mr. D. Mark Bienvenu
Attorney at Law
Post Office Box 3527
Lafayette, Louisiana 70502-3527

RE: EDWARD C. ABELL, JR. AND CAREY WALTON, ET AL V. JOE E. FRYAR, ET AL— NO. 87-4260

Dear Mr. Bienvenu:

As per our telephone conversations regarding the cost of the official transcript on appeal in this case, please find enclosed payment in the amount of $1,206.38. We have tendered payment in the same amounts to the plaintiffs and Joe Fryar.

It was learned in our discussions with counsel for Fryar and you that payments had been made by Fryar and Wright, Lindsey & Jennings in the amount of $4,825.50 each for the official transcript. Assuming that the plaintiffs paid the same or similar amount, we multiplied $4,825.50 times three, for a total of $14,476.50. When we divide that number by four, each party's pro rata share should be $3,619.12. The tendered payment enclosed represents the difference between what your client was required to pay for the official transcript, and what they should have paid.

Please let me know if this payment is sufficient, and with kind regards, I remain

Yours very truly,
Leslie R. Leavoy, Jr.
lhm
enclosure